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On Writ of Certiorari to the Court of Claims

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 43

THE TEE-HIT-TON INDIANS, an identifiable group of
of Alaska Indians, *Petitioner*,

v.

THE UNITED STATES.

**BRIEF OF THE ATTORNEY GENERAL OF IDAHO.
AMICUS CURIAE**

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INDEX

	Page
Nature of the State's Interest	1
Statement	3
Question Presented	3
Argument	4
Conclusion	8

TABLE OF CASES

Duwamish Indians v. United States, 79 C. Cls. 530, cert. den. 295 U.S. 755	8
Klamath & Modoc Tribes &c. v. United States, 2 Ind. Cls. Com. 684	6
Northwestern Bands of Shoshone Inds. v. United States, 324 U.S. 335	8
Pawnee Tribe v. United States, 124 C. Cls. 324, 109 F. 2d 860, rev'g 1 Ind. Cls. Com. 245	6
United States v. Alcea Band of Tillamooks, 329 U.S. 40.7, 8	

TABLE OF STATUTES AND OTHER AUTHORITIES

Indian Claims Commission Act, Act of August 13, 1946, c. 959, 60 Stat. 1049, 25 U.S.C. § 70(a) et seq.	3, 4, 5
Sec. 2, 25 U.S.C. § 70a(4)	4, 5, 6, 7, 8
Sec. 24, 28 U.S.C. § 1505	4, 6, 7, 8
Menominee Termination Act, Act of August 15, 1953, c. 505, 67 Stat. 588	2
H. Con. Res. 108, 83d Cong.	2
Joint Hearings, Comms. on Interior and Insular Affs., on Termination Fed. Supervision over Certain Tribes of Inds., 83d Cong., 2d Sess.	2, 3

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*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:*

This brief is respectfully submitted on behalf of the
State of Idaho.

NATURE OF THE STATE'S INTEREST

The State of Idaho has within the state five tribes,
bands, or communities of Indians each of whom has pend-
ing in the Indian Claims Commission a case against the

United States depending in one way or another upon the ownership or occupancy by the particular group of lands within the state prior to the time those lands were seized or purchased by or through the United States.¹

In recent sessions of Congress there has been a pronounced movement towards and an announced policy of "withdrawal" or "termination" of federal supervision over and responsibility for Indians and Indian tribes.²

The fruition of this policy as applied to the Indians of Idaho will eventually leave this state the serious problems of providing community and social services and supervising the adjustment of its Indian citizen to the proposed new status of unregulated responsibility. This task cannot be intelligently pursued without ascertaining what assets the Idaho tribes have with which to plan their future, which in turn requires that they have a forum for the prompt and full disposition of their land claims against the United States.³ It is the interest of this *amicus* to see

¹The tribes referred to, together with docket numbers of their respective cases in the Indian Claims Commission, are as follows:

Shoshone-Bannock Tribes of the Fort Hall Reservation, Nos. 326, 366, and 367.

Coeur d'Alene Tribe, DeSmet, Idaho, No. 81.

Kootenai Indians of Idaho, Bonners Ferry, Idaho, No. 154.

Nez Perce Tribe, Lapwai, Idaho, No. 175.

²H. Con. Res. 198 expresses " * * * the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; * * * " and expresses the sense of Congress that " * * * at the earliest possible time * * * " all Indian tribes and members thereof in states not including Idaho, " * * * should be freed from Federal supervision and control * * * "

³Note that following determination of the claims of the Menominee Indians of Wisconsin, Congress has adopted so-called "termination" legislation, which involves planning on the basis of, among other assets, the more than \$8,000,000 of a Court of Claims award. Act of August 15, 1953, c. 505, 67 Stat. 588; see Joint Hearings of the Committees on Interior and Insular Affairs on

that the purposes of the Indian Claims Commission Act are not frustrated by an improvident interpretation which would deny the Indians an opportunity to settle their ancient grievances against the federal government before its responsibilities to the Indians of Idaho are terminated.

STATEMENT

Respondent, the United States, undertook to sell all the merchantable timber on certain lands in Alaska, to which petitioner, the Tee-Hit-Ton clan or group of Indians, asserted possessory rights—*i.e.*, they asserted "original Indian title" or right of occupancy. For the taking of the interest in its lands petitioner brought action in the Court of Claims under Section 1505 of the Judicial Code. That section of the Judicial Code accords a jurisdiction which, as to its substantive features, originally had been accorded the Court of Claims in the Indian Claims Commission Act, Section 24 (c. 959, 60 Stat. 1049, 1055).

The Court of Claims found (R. 19-20) that petitioner had no compensable interest in the lands, and as a result, it sustained the motion of respondent to dismiss the action (R. 32-35).

QUESTION PRESENTED

Whether the petition for certiorari was providently granted, *i.e.*,—

"Termination of Federal Supervision Over Certain Tribes of Indians," 83d Cong., 2d Sess., part 6, p. 589 *et passim*. Intelligent planning is not possible until the value of the claims, on the basis of a full and fair award, is established. Mere denial of the claims on a jurisdictional technicality does little but throw the particular Indians back as petitioners to Congress for further jurisdictional legislation. As stated by the Chairman of the House Committee, Mr. Jackson, in the debate on H.R. 4497, 79th Cong., 1st Sess., which became the Indian Claims Commission Act, "If you are ever going to settle this Indian question in the United States, you have to settle these claims." See debate May 20, 1946, 92 Cong. 5314.

Whether it was correctly represented by the parties⁴ that this case involved, among other important matters, the question whether the taking of lands owned by right of "original Indian title" is compensable in cases brought before the Indian Claims Commission. To the extent this Court granted the petition on that representation (as distinguished from other grounds advanced), it is the position of this *amicus* that the Court was imposed upon and the writ should be dismissed as improvidently granted.

Alternatively, whether any determination by the Court in this case, founded on the grant of jurisdiction to the Court of Claims in Section 24 of the Indian Claims Commission Act (now in substance appearing as 28 U.S.C. § 1505), could have any effect, as represented by the parties, on the actions brought before the Indian Claims Commission pursuant to Section 2(4) of the same act (25 U.S.C. § 70a(4)).

ARGUMENT

The cases before the Indian Claims Commission which involve directly or indirectly the question of Indian title generally have been filed under a grant of jurisdiction (Section 2 of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1050; 25 U.S.C. § 70a) more extensive than that accorded to the court below (Jud. Code § 1505). In the court below, as to claims arising

⁴ The petition for writ of certiorari states, page 12, that the importance of review in this case is enhanced by the fact that there is a large number of pending or potential "stateside" cases which would appear to be affected by the ruling that original Indian title would not be a right on which a suit against the United States could be based. Petitioner's statement is rather modest, recognizing as it does that there may be distinctions in the jurisdictional acts on which most claims are based as opposed to the claim under review. No such modesty is apparent in the statement of the respondent (Memorandum for the United States, pp. 9-10), which asserts without recognizing distinctions in the jurisdictional acts of this case and Indian Claims Commission cases that out of 800 claims asserted before the Indian Claims Commission, about half involve in some form or other the question of compensability of "original Indian title."

after the date of the Indian Claims Commission Act, a tribe may sue only for claims "arising under the Constitution, laws, treaties of the United States, or Executive orders of the President" or within a class of claims which would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group. As to claims before the date of the Indian Claims Commission Act, similar action equally might be brought in the Indian Claims Commission under identical jurisdictional language. But beyond and quite in addition to that, the Indian Claims Commission was given jurisdiction of specific classes of ancient grievances, and specifically of "claims arising from the taking by the United States * * * of land owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant." Sec. 2(4).

It is under this provision that most of the original Indian title cases have been brought before the Commission.⁵ However, the Commission by its rulings in cases brought under Section 2(3) of the act for the taking of lands by the United States for an unconscionable consideration,⁶ has placed original Indian title in issue in those cases by requiring the claimant to show that it had

⁵ In those cases the United States—sometimes without any pretense of formality—dealt with the lands, claimed to have been held by the Indian tribe under Indian title, as if they were its own, dispossessing the original Indian owners and users of those lands. Sometimes this dispossession was done only after much bloodshed and violent opposition, as in the case of the heroic struggle of Chief Joseph of the Nez Perce to resist removal from the land of his birth and requiring the military might of the United States to remove him, and sometimes it was done peacefully, as in the case of the Kalispel Indians, who with their passion for peace did not make war in resistance to the patenting to white settlers of the lands theretofore held by them.

⁶ Sec. 2(3) of the Act (25 U.S.C. § 70a(3)) provides for hearing and determination of " * * * (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; * * * "

the Indian title which by treaty it purported to cede to the United States. See *Pawnee Tribe of Oklahoma v. United States*, 124 C. Cls. 324, 329, 109 F. Supp. 860, reversing (on other issues) 1 Ind. Cls. Com. 245, 252; *Klamath and Modoc Tribes and Yahooskin Band of Snake Indians v. United States*, 2 Ind. Cls. Comm. 684, 686-687 (decided April 9, 1954).

To suggest that such claims filed under the Commission's jurisdiction will in some manner be determined by the decision of the court below in the instant case on a claim filed under the more limited jurisdiction is almost an imposition upon this Court. The separateness of the jurisdictional provisions is most readily shown in parallel treatment of the sections of the Indian Claims Commission Act which accorded jurisdiction to the Commission and to the Court, respectively. We call attention to the fact that sub-section (4) of the section (Section 2) relating to Indian Claims Commission jurisdiction, and to some extent sub-section (3), under which the overwhelming bulk of "Indian title" cases are heard by that Commission, find no counterpart in the jurisdictional provisions relating to the Court of Claims:

Indian Claims Commission
Section 2

Sec. 2. The Commission shall hear and determine the following claims against the United States

on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska:

(1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President;

Court of Claims
Section 24 (now 28 U.S.C. 1505)

Sec. 24. The jurisdiction of the Court of Claims is hereby extended to any claim against the United States accruing after the date of the approval of this Act

in favor of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska

whenever such claim is one arising under the Constitution, laws, treaties of the United States, or Executive orders of the President,

(2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;

(3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity;

(4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and

(5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

Historically the general jurisdictional grants authorizing the Court of Claims to hear merely claims "arising under or growing out of the Constitution, or any treaty or agreement, statute or Executive order" involving a particular tribe have always been strictly construed so as to preclude the recovery on a claim based upon original Indian title. *United States v. Alcea Band of Tillamooks*,

or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

329 U.S. 40, 45.⁷ Such decisions have sent the Indians back to Congress for an express grant of authority to sue for the taking of their Indian title. In *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 44-46, 54-55, this Court affirmed the Court of Claims in its finding of liability on the part of the United States for a taking of lands held under original Indian title. And in the Indian Claims Commission Act, the language of Section 2(4) has likewise accorded jurisdiction to the Commission to allow recovery for the taking of original Indian title.

Accordingly, whatever dispute may be made as to the scope of the conventional language according jurisdiction to the Court of Claims (Jud. Code, § 1505), the determination of that question in the instant case can have no bearing on the additional, express jurisdiction accorded to the Indian Claims Commission by Section 2 of the Act.

CONCLUSION

Insofar as this Court was induced to grant certiorari on the representation that the determination of the question of "compensability" of Indian title under the jurisdiction of the Court of Claims would have some bearing on cases involving Indian title under the jurisdiction of the Indian

⁷ "Prior to 1929, adjudications of Indian claims against the United States were limited to issues arising out of treaties, statutes, or other events and transactions carefully designated by Congress. This Court has always strictly construed such jurisdictional acts and has not offered judicial opinion on the justness of the handling of Indian lands, except in so far as Congress in specific language has permitted its justiciable recognition." (p. 45)

See also *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 337, 339, where this Court held (contrary to the position of the then Attorney General of Idaho) that under the standard jurisdictional language the Indians could not recover for the taking of lands proved to have been held by original Indian title, and *Duwamish Indians v. United States*, 79 C. Cls. 530, cert. den. 295 U.S. 755.

Claims Commission, to that extent this Court has been imposed upon and the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

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